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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Telecommunications Services)
Inside Wiring)
)
Customer Premises Equipment)

CS Docket No. 95-184

DOCKET FILE COPY ORIGINAL

COMMENTS OF LIBERTY CABLE COMPANY, INC.

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SUMMARY

Liberty believes the Commission should take at least two actions in this proceeding to facilitate competition. First, the Commission should revise its definition of the cable demarcation point in multiple dwelling units ("MDUs") to ensure that competing video service providers have meaningful access to video inside wiring. The existing demarcation point is frequently inaccessible to alternate providers since the wiring at the demarcation point often is embedded in brick, concrete or cinder blocks, or concealed in conduits or moldings.

Liberty renews its request that the Commission move the demarcation point to a location where an individual subscriber's line can be detached easily from the cable operator's common line without disrupting the interior of the subscriber's apartment or the MDU. In support of its request, Liberty provides further evidence to: (i) demonstrate that the problems associated with accessing existing inside wiring are (and will be) faced by competing MVPDs nationwide; (ii) illustrate the ineffectiveness of the existing cable demarcation point; and (iii) demonstrate why a demarcation point located where the common line meets a dedicated line is desirable even though its specific location could vary from building to building.

Second, the Commission should preempt state cable mandatory access laws to the extent such laws discriminate against non-franchised multichannel video programming distributors ("MVPDs").

Liberty has first-hand experience with the anticompetitive effects of these laws which guarantee access to franchised cable operators, but not non-franchised MVPDs.

With respect to other issues raised in the Notice of Proposed Rulemaking:

Liberty does not take a position as to whether there should be a common demarcation point for video and telephony. However, if the Commission establishes a common demarcation point, it must ensure that this demarcation point is easily accessible to alternate providers.

Liberty believes that the existing cable compensation rules do not need to be modified if the location of the demarcation point is moved since cable operators would be equitably compensated under the existing regulatory scheme regardless of the wire length.

If the Commission moves the cable demarcation point as Liberty proposes, there should be no adverse effect on signal leakage. In fact, Liberty's proposed demarcation point should minimize the risk of signal leakage and, when there is signal leakage, facilitate its detection.

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COMMENTS OF LIBERTY CABLE COMPANY, INC.

Liberty Cable Company, Inc. ("Liberty"), pursuant to Section 1.415 of the Commission's Rules, submits these Comments in response to the Notice of Proposed Rulemaking in the above captioned proceeding ("NPRM"). Liberty supports the NPRM's underlying objective which is to develop rules to govern the telecommunications marketplace that will promote competition and consumer choice. The Commission should take at least two actions initially to facilitate competition. First, the Commission should revise its definition of the demarcation point in multiple dwelling units ("MDUs") to ensure that competing video service providers can access the video inside wiring. Second, the Commission should preempt state cable mandatory access laws to the extent such laws discriminate against non-franchised multichannel video programming distributors ("MVPDs").

Although the NPRM raises a multitude of issues affecting both the existing cable and telephony inside wiring rules, these Comments will focus on the following four issues, primarily as they apply to MVPDs: (1) demarcation point; (2) service provider access

to private property; (3) compensation for wiring; and (4) signal leakage.

I. DEMARICATION POINT

A. The Commission Should Modify its Existing Cable Inside Wiring Rules in Multiple Dwelling Units to Ensure that Competing Video Service Providers Have Meaningful Access to the Inside Wiring.

It is clear from the record in MM Docket No. 92-260 ("Cable Inside Wiring Proceeding") that the existing cable inside wiring rules applicable to MDUs frustrate a competitive video marketplace.^{1/} Indeed, the Commission has stated that "we are concerned ... that the current demarcation point may be impeding competition in the video services delivery marketplace...."^{2/}

In the Cable Inside Wiring Proceeding, Liberty argued that a demarcation point which is twelve inches outside a subscriber's apartment frustrates competition in the video market; the demarcation point, as defined, is frequently inaccessible to alternate providers since the wiring at the demarcation point often is embedded in brick, concrete or cinder blocks, or concealed in conduits or moldings. Liberty asked the Commission to move the demarcation point to a location where an individual subscriber's line (i.e., a "dedicated line") can be detached easily from the

^{1/} Since the Commission will consider the record of the Cable Inside Wiring Proceeding in this proceeding (see NPRM ¶ 1 n.2), Liberty will only discuss some of the more significant arguments it raised in previous filings on this issue.

^{2/} NPRM ¶ 17.

cable operator's common line (i.e., a "common line") without disrupting the interior of the subscriber's apartment or the MDU. Liberty's demarcation point would provide competing MVPDs with meaningful access to the inside wiring -- as long as the incumbent service provider does not prevent the competing MVPD from accessing the junction box or other passive equipment necessary to physically reach the demarcation point.^{3/} Without access to the demarcation point, Liberty and other alternate providers cannot effectively compete against the entrenched cable monopolists, resulting in fewer choices for consumers. Although the Commission initially denied Liberty's proposal in the Cable Inside Wiring Proceeding, the Commission made it clear that it would be appropriate to revisit the demarcation issue in a broader competitive context.^{4/}

Liberty hereby renews its request for the Commission to amend its cable inside wiring rules as Liberty proposed in the Cable Inside Wiring Proceeding. To supplement Liberty's previous submissions on this issue, these Comments will: (i) demonstrate that the problems experienced by Liberty in accessing existing inside wiring are (and will be) faced by competing MVPDs nation-

^{3/} The Commission's revised cable inside wiring rules provide that "incumbent cable operator must take reasonable steps within their control to ensure that an alternate service provider has access to the home wiring at the demarcation point." 47 C.F.R. 76.802(j). Liberty understands that this requirement obligates a cable operator to provide a competing service provider with reasonable access to a junction box (or other equipment) in order to effectuate a service switch-over.

^{4/} See First Order on Reconsideration and Further Notice of Proposed Rulemaking ¶ 32, MM Docket No. 92-260, released Jan. 26, 1996.

wide; (ii) describe why the current demarcation point is inaccessible in situations where the existing dedicated lines are located in conduits or hallway moldings; and (iii) demonstrate why a demarcation point located where the common line meets a dedicated line is desirable even though its specific location could vary from building to building.

1. The Inability of Competing MVPDs to Access the Demarcation Point Frustrates Competition in the Video Marketplace Nationwide

Over the past three years, the general perception at the Commission has been that the inside wiring issue is exclusively a "New York" issue and evidences the animosity between Liberty and Time Warner, the incumbent cable operator with which Liberty competes in New York. This perception is wrong.

Although Liberty, as a pioneer of competition in cable, may have been one of the first to experience the inequities and anticompetitive effects of the existing inside wiring rules, other service providers operating (or planning to operate) in metropolitan areas across the country are now experiencing these same problems. This is not surprising given that more and more Americans today are living in MDUs. Indeed, MDUs accounted for 28% of the entire U.S. housing market in 1990.^{5/} Moreover, the number of dwelling units in MDUs in the U.S. increased by 51% between 1980 and 1990, while the number of U.S. households and single family

^{5/} See Table 1.

residences grew by only 14% and 15%, respectively.^{6/} MDUs account for an even larger share of the housing market in major metropolitan areas. According to Table 1 and Figure 1, MDUs make up between 32% and 84% of the housing market in the specified U.S. cities which have the greatest number of cable households.^{7/} These figures are significant since competition in the video marketplace is most likely to develop first in metropolitan areas where competing service providers can pass the greatest number of potential subscribers with each foot of plant.^{8/}

As telephone companies initiate video programming service to telephone customers, many are realizing that they cannot reach subscribers in MDUs because they cannot access the inside wiring at the demarcation point specified by the Commission. Liberty is a member of a coalition with various telephone companies and consumer groups including the United States Telephone Association, the Consumer Federation of America, Media Access Project, Bell Atlantic, GTE, NYNEX and others. The coalition was formed to convince the Commission of the anticompetitive nature of the

^{6/} See Table 1, Table 2 and Figure 2. Figure 2 demonstrates graphically how the increase in the number of single family residences over the past decade has mirrored the stable growth rate for individuals, families and households, while the number of MDUs has grown four times faster than individuals and families, and three times faster than the number of households.

^{7/} See 1 Cable & Broadcasting Yearbook 1995 at D-75 (1995).

^{8/} See, e.g., The Communications Act of 1995: Hearings on H.R. 1555 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 104th Cong., 1st Sess. (May 11, 1995) (1995 FCC LEXIS 3185, at *5) (statement of Reed E. Hundt, Chairman, FCC).

existing demarcation point rule. Liberty and other coalition members met with Commission staff in the Cable Services Bureau, the Common Carrier Bureau, the General Counsel's Office, each of the Commissioners' offices, and the Chairman's office, urging them to modify the rule in the manner Liberty has proposed so that competition in the video marketplace could develop. As the foregoing illustrates, the perception that the inside wiring issue is merely a Liberty\Time Warner dispute over subscribers in New York is a gross misconception and oversimplification of the issues involved.

2. Specific Examples of the Inaccessibility of Inside Wiring Located in Hallway Molding and Conduit

A primary objective of the 1992 Cable Act is to promote competition in the video marketplace by allowing competing MVPDs to access existing cable inside wiring without disrupting the interior of a subscriber's home. The objective of the Act was to make it effortless for subscribers to switch from their existing cable operator to a competing MVPD.^{2/} The Commission's existing cable inside wiring rules, however, thwart Congress' vision and intent. Instead of giving subscribers the ability to choose from a multitude of MVPDs (by allowing MVPDs to access the cable inside wiring), the Commission has allowed cable operators and building owners to dictate consumer choice and frustrate competition.

Liberty's experience shows how the current demarcation point harms competition. As a practical matter, Liberty cannot offer

^{2/} See H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992).

video services in many MDUs because it cannot access the inside wiring if the existing lines dedicated to individual subscribers are concealed in hallway moldings. Specifically, the incumbent cable operator is generally unwilling to let Liberty use the molding and, as a result, Liberty is precluded from offering its service to MDU residents.

Liberty's experience at 11 Riverside Drive, a 630 unit rental building in Manhattan, vividly demonstrates the difficulties inherent in wiring an MDU where the existing wiring is concealed in hallway molding.^{10/} 11 Riverside Drive is currently served by Time Warner. Time Warner's dedicated lines run along the base boards in the building's hallways and are enclosed in unattractive plastic molding. Although the molding is large enough to accommodate seven or more coaxial cables, Time Warner has consistently rejected Liberty's attempts to negotiate a reasonable arrangement to share the molding. Time Warner asserts that since it purchased and installed the molding, Liberty should not be allowed to use it for Liberty's dedicated lines, unless Liberty agrees to pay a one-time license fee of \$12,000 and a \$1,000 annual maintenance fee. Liberty is not opposed to paying a reasonable maintenance fee for the molding, but the proposed license fee is entirely unreasonable -- Liberty could purchase and install its own molding in the building (and possess a 100% ownership interest in that molding)

^{10/} Liberty has had similar experiences at numerous buildings including those located at 100 West 57th Street and 205 West End Avenue.

for \$12,000. Moreover, it would be economically prohibitive for Liberty or any other competing MVPDs to enter into similar licensing agreements with Time Warner for every building Time Warner serves.

Liberty has proposed two alternate arrangements for sharing the hallway molding at 11 Riverside Drive. First, Liberty agreed to pay the \$1,000 annual maintenance fee and a one-time \$12,000 payment which would entitle Liberty to a one-half ownership interest in the molding. Second, Liberty proposed that the building should purchase the molding from Time Warner. Liberty would then reimburse the building for the purchase price, and the building could grant access to the molding to Time Warner, Liberty, or any other service provider requested by the residents. Time Warner has yet to accept either proposal.

Given the virtual impossibility of obtaining access to the hallway molding installed by Time Warner, Liberty proposed installing its own molding along side the existing molding. However, the owner of 11 Riverside Drive (like all other landlords with whom Liberty has dealt) will not permit installation of a second molding, primarily for aesthetic reasons. Nor can Liberty force the owner of 11 Riverside Drive to permit Liberty to install a second molding. Therefore, as a practical matter, Liberty has no

way to bring its video services to residents of 11 Riverside Drive.^{11/}

Liberty's experience at 11 Riverside Drive demonstrates precisely how the existing cable inside wiring rules frustrate competition and allow incumbent cable operators (as well as building owners) to create a bottleneck which inhibits consumer choice. As a matter of public policy, the Commission should not encourage franchised cable operators to charge their potential competitors an "access fee" simply to have the opportunity to compete. To do so, would anoint the franchised cable operator as the gatekeeper that decides which MVPDs can offer their services to subscribers in that MDU.

Those seeking to compete with franchised cable operators also are often unable to provide video programming to MDU residents where the dedicated lines are inside the walls or under the floors of the building, in conduits or are otherwise physically inaccessible. Liberty's experience at the Pavilion at 500 East 77th Street, an 800 unit rental building in Manhattan, is illustrative. The Pavilion's dedicated lines are buried within the cement walls and floors of the building and encased in 1/4 inch conduit which can accommodate only a single wire. Since Time Warner refuses to remove its wiring from these conduits upon termination of its

^{11/} As discussed more fully in Section II herein, Liberty's franchised competitors can install hallway molding in all buildings in New York pursuant to New York City franchise agreements and New York's mandatory access law.

service, it blocks Liberty from using the conduit. And, since landlords prohibit Liberty from installing duplicative hallway molding, Liberty usually has no way to reach potential subscribers or even the demarcation point. Pavilion residents are thus precluded from having a choice in video programming providers. This is not the result Congress intended when it enacted the 1992 Cable Act, nor is it the result the Commission sought when it adopted its inside wiring rules.

3. Liberty's Proposed Demarcation Point is Sufficiently Defined and Accommodates Different Architectural Settings.

The NPRM suggests that some cable operators believe that placing the demarcation point where Liberty proposes "is not precise enough because such a point could vary from building to building".^{12/} Liberty disagrees. The demarcation point Liberty proposes clearly delineates where a competing service provider, on behalf of the subscriber, may access the inside wiring. Although the precise location of the demarcation point might vary from building to building, the principle governing the location of the demarcation point is identical in every building.

As previously discussed, Liberty's proposed demarcation point solves the access problem in multi-story apartment buildings regardless of whether the dedicated lines are contained in conduit or hallway molding. In addition, Liberty's proposed demarcation point is also appropriate for other MDU construction. For example,

^{12/} NPRM ¶ 10.

Liberty currently serves Riva Point, a row house type complex built on a pier in Weehawken, New Jersey. The complex was prewired for cable service and there are no hallways or yards that could be wired with alternative dedicated lines. The only way a competing MVPD can serve Riva Pointe is by using existing dedicated lines and owner installed conduits.

Significantly, when the Commission adopted its telephony inside wiring rules (where the location of the demarcation point also varies), the Commission specifically stated that it "believes that the definition of the demarcation point adopted ... is sufficiently defined to clearly delineate where the customer may access the telephone network and for accounting purposes as well".^{13/} Any claims that Liberty's proposed demarcation point would create undue customer and utility personnel confusion is baseless and should be ignored as were similar claims made when the Commission adopted its telephony inside wiring rules.^{14/}

B. If the Commission Establishes a Common Demarcation Point for Cable and Telephony Inside Wiring, It Must Ensure that Competing Service Providers are Guaranteed Meaningful Access to the Inside Wiring.

The NPRM asks whether there should be a common demarcation point for wireline communications networks regardless of

^{13/} In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, Report and Order and Further Notice of Proposed Rule Making, 5 F.C.C. Rcd 4686, 4706 n.25 (1990).

^{14/} Id.

whether such networks are broadband or narrowband, or for cable or telephony service. In these Comments, Liberty does not take a position as to whether there should be a common demarcation point. However, if the Commission establishes a common demarcation point, it must ensure that this demarcation point is easily accessible to alternate providers. Without such access, each provider (telephony or video) will have to run its own wire directly into each potential subscriber's dwelling unit; this is the same problem Liberty currently confronts in offering video programming.

If the Commission adopts a common demarcation point, neither the existing telephony nor cable inside wiring rules are an appropriate model because neither guarantees that a competing service provider will have access to the demarcation point. Specifically, under the current telephony inside wiring rules, either the local carrier or the MDU owner (depending on when the wiring was installed) may set the telephone demarcation point(s) anywhere within the MDU up to twelve inches into a subscriber's apartment (including a point which is not easily accessible to competing service providers).^{15/} And, for the reasons discussed at length herein, the existing cable demarcation is simply inaccessible to alternate providers in most MDUs.

^{15/} See 47 C.F.R. § 68.3.

II. THE COMMISSION SHOULD PREEMPT DISCRIMINATORY CABLE ACCESS LAWS

Not only should the Commission change the existing cable demarcation point, it also should preempt state and local laws that give franchised cable operators access to MDUs on more favorable terms than other MVPDs.^{16/} As discussed more fully below, these laws are anticompetitive and frustrate competition in the video marketplace.

A. State Mandatory Access Laws Which Guarantee Access to Franchised Cable Operators Are Anticompetitive and Hinder the Ability of Non-Franchised MVPDs to Compete in the Video Marketplace.

Liberty agrees with the Commission that inequality in access to private property can unfairly benefit one service provider over another.^{17/} Liberty has first-hand experience with the problem of discriminatory access-to-property statutes since the two states where Liberty does business, New York and New Jersey, have statutes that guarantee franchised cable operators access to MDUs. Liberty, which is not a franchised cable operator, does not

^{16/} Moving the demarcation point will alleviate some MDU owners' concerns about the aesthetics of a second cable installation. But only the preemption of discriminatory cable access laws will address MDU owner fears unrelated to aesthetics such as offending the incumbent or risking a lawsuit for allowing the shared use of conduits. There has been no preemption of state cable access laws by the federal cable statutes. Amsat Cable v. Cablevision of Connecticut, 6 F.3d 867 (2d Cir. 1993).

^{17/} See NPRM ¶ 61.

enjoy the same benefit of guaranteed MDU access and has been hurt by that discrimination.^{18/}

The New York and New Jersey cable access laws were enacted over 25 years ago when franchised cable operators were the only source of multichannel video programming. These cable access laws give MDU residents access to cable service provided on a "cable system" which, under federal law, must have a state or local franchise.^{19/}

Cable access laws were originally intended to protect tenants and franchised cable companies from landlords who wanted a share of cable revenues. But with the advent of competition from non-franchised MVPDs, that protection began to operate unfairly because only franchised cable operators are guaranteed access to MDUs while all other MVPDs must obtain owner consent -- which is not always

^{18/} State officials responsible for the enforcement of the cable access laws have stated that Liberty is not guaranteed MDU access under those laws because Liberty operates without a franchise. Time Warner has also taken the position that cable access laws benefit only franchised cable companies. See Amsat Cable v. Cablevision of Connecticut, supra note 16, Brief of Amicus Curiae Time Warner of New York City.

^{19/} See 47 U.S.C. §§ 522(7) and 541(b). The New York cable access law, Executive Law § 828, was upheld in Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983). The New Jersey cable access law, N.J.S.A. 48:5A-49, was upheld in NYT Cable TV v. Homestead at Mansfield, Inc., 111 N.J. 21 (1988). Connecticut, where Liberty plans to do business in the future, also has an access law that gives only state licensed providers of "telecommunications services" access to MDUs, Conn. G.S.A. § 16-333a.

forthcoming.^{20/} Since 1990, the Commission has recognized that this discrimination in cable access laws "operate[s] to hinder the growth of alternative distribution services."^{21/}

Liberty's experience confirms that discriminatory cable access laws hurt non-franchised MVPDs. There are dozens of building owners throughout the New York metropolitan area who refuse to entertain a proposal from Liberty because they already receive cable from the franchised cable operator and the owner does not want to be bothered with having a second video delivery system installed at the building. Discriminatory mandatory access laws guarantee that only franchised cable operators will continue to serve these buildings.

Liberty's experience also demonstrates that a common reason MDU owners are hesitant to give competing MVPDs access to the building is that they fear the incumbent franchised cable operator will file a lawsuit against them.^{22/} On five occasions, Time

^{20/} See NPRM ¶ 61.

^{21/} In the Matter of Competition, Rate Deregulation and the Commission's Policies as Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 4962, ¶ 140 (1990) (the "1990 Competition Report").

^{22/} In some cases, MDUs are not interested in Liberty's service because certain MDU co-op board members have close business or professional ties with the incumbent franchised cable operator. In other cases, the MDU owner does not want to jeopardize losing the "fringe benefits" offered by the incumbent franchised cable operator (e.g., discount pricing for the installation of a security system and other custom wiring, or free service for the building superintendent).

Warner has sued the owners of buildings who allowed Liberty to use wire and conduits installed by the owner.^{23/} In each case, Time Warner claimed that it has the sole and exclusive use of owner installed wire and conduits under Executive Law § 828. In each case, Time Warner claimed over \$1 million in damages for the owner's interference with Time Warner's rights under Executive Law § 828.

Time Warner is not the only franchised cable operator to adopt this litigation terror tactic against Liberty. For example, when Liberty installed a system at the Riva Pointe Condominiums in Weehawken, N.J. using owner installed wiring and conduits, Cablevision of Riverview sued the Condominium Association and Liberty for unspecified compensatory and punitive damages claiming a violation of N.J.S.A. 48:5A-49.^{24/}

^{23/} See Paragon Cable Manhattan v. 180 Tenants Corporation and Douglas Elliman-Gibbons & Ives, Inc., Supreme Court of the State of New York, New York County, Index No. 6952/92; Manhattan Cable Television, Inc. v. Fifty-First Beekman Corp., Supreme Court of the State of New York, New York County, Index No. 92-16790; Paragon Cable Manhattan v. P & S 95th Street Associates and Milstein Properties Corp., Supreme Court of the State of New York, New York County, Index No. 130734/93; 10 West 66th Street Corporation v. Manhattan Cable Television, Inc., Supreme Court of the State of New York, New York County, Index No. 10407/92; Manhattan Cable Television v. 35 Park Avenue Corp., WPG Residential, Inc. and Williamson, Picket, Gross, Inc., Supreme Court of the State of New York, New York County, Index No. 23339/92. For more details regarding these cases, see pp. 8-10 of Liberty's November 14, 1994 ex parte letter in the Cable Inside Wiring Proceeding which vividly describes these multimillion dollar lawsuits filed against potential Liberty customers in a baseless attempt to scare them away from doing business with Liberty.

^{24/} Cablevision of Riverview v. Liberty Cable Co., Inc., Riva Pointe Condominium Association, Affirmative Management Inc., and
(continued...)

Discriminatory cable access laws also give franchised cable operators an additional unfair advantage in overcoming the exclusive contracts of non-franchised MVPDs. There are several large apartment complexes in the New York metropolitan area served by non-franchised MVPDs pursuant to exclusive contracts. Those exclusive rights are unenforceable against franchised cable companies due to the cable access laws.^{25/} However, non-franchised MVPDs like Liberty cannot access these properties because Liberty is not a beneficiary of the cable access laws.^{26/}

Cable access laws also favor franchised cable operators by giving them the power to dictate how a building will be wired. For example, Liberty has an established business relationship with a major real estate developer who owns and manages several large apartment buildings in New York City. This developer grants Liberty access to its buildings as long as no molding or wires are installed in the hallways. As a result, Liberty has been unable to wire all of the developer's buildings. By contrast, Liberty's franchised cable competitors can install hallway wiring and molding in all of the developer's buildings by operation of Executive Law

^{24/} (...continued)

Darryl Rankin, Superior Court of New Jersey, Hudson County, Law Division, Docket No. HUD-L-2415-95.

^{25/} See Amsat Cable v. Cablevision of Connecticut, supra note 16; NYT Cable TV v. Homestead at Mansfield, Inc., supra note 19.

^{26/} Although Liberty's contracts provide for exclusivity with respect to non-franchised MVPDs, Liberty would gladly give up that exclusivity if all MVPDs were guaranteed access under state access laws.

§ 828 and their New York City franchises. Thus, the franchised cable operators are guaranteed access to all tenants of this developer through hallway molding, but Liberty is not.

Notwithstanding the cable mandatory access laws, Liberty has obtained access to over 130 buildings in Manhattan with the owner's consent and without paying for access. In each building served by Liberty, the owner dictates the method of installation. It has been Liberty's experience that MDU owners are greatly concerned about the aesthetics of the wire installation and, if given the choice, they will reject hallway molding. Time Warner's claim that MDU owners will accept duplicative or ugly cable installations in hallways and on building exteriors in exchange for "handsome compensation" is absurd and has no factual support. In fact, an MDU owner has never allowed Liberty to install duplicative hallway molding.

B. The Commission Should Preempt Enforcement of State Cable Access Laws to the Extent Such Laws Discriminate Against Non-Franchised MVPDs.

A guiding principle in this proceeding -- indeed for national telecommunications policy in general -- is that market-place competition works only if consumers have true freedom of choice. A natural corollary of this principle is that residents of MDUs should have, to the maximum extent possible, the same freedom of choice as residents of single family homes.

In New York and New Jersey, MDU residents have the same freedom as single family residents to choose service from franchised MVPDs. But they do not have the same freedom to choose service from a non-franchised MVPD. Simply put, MDU owners -- not residents -- control consumer access to non-franchised MVPD companies. As a consequence, the competition for cable service in states with discriminatory cable access laws is inexorably skewed in favor of franchised MVPDs.

The Commission should rectify this discrimination by preempting cable access law to the extent they favor franchised MVPDs over non-franchised MVPDs. Such preemption will let each state adopt -- if it wishes -- an MDU access policy that implements the consumer's choice in a manner consistent with local MDU conditions.

Commission preemption of discriminatory state and local access laws would be consistent with the Commission's own precedent. For example, by adopting 47 C.F.R. §25.104, the Commission preempted local zoning regulations that discriminate between satellite television receive-only antennas ("TVROs") and other types of television receiving antennas. This preemption ensures that consumers can use TVROs to receive satellite television services as easily as they receive off-air television with conventional antennas. The federal courts have enforced this preemption on many occasions.^{27/}

^{27/} See, e.g., Van Meter v. Township of Maplewood, 696 F. Supp. 1024 (D. N.J. 1988).

The Commission also has preempted state regulation of SMATV systems that either "intentionally or incidentally result[s] in the suppression of that service in order to advance" the interests of franchised cable companies.^{28/} The record in this proceeding shows, and the Commission's 1990 Competition Report has already found, that discriminatory cable access laws "operate to hinder the growth of alternative distribution services." As Liberty's experience shows, discriminatory cable access laws inhibit services by non-franchised MVPDs and "advance the interests" of franchised MVPDs. Accordingly, the Commission can and should extend the preemption adopted in ESCOM to discriminatory cable access laws.

Preemption of discriminatory cable access laws will let states decide the issue of MDU access subject only to the overriding federal interest that there be equal access rights between franchised and non-franchised MVPDs. Thus, each state can and should decide for itself the best approach for addressing local MDU conditions. Among the options available to the states are:

- a. Adopt access laws (or amend existing laws by legislation or administrative action) that grant all MVPDs access to MDUs;

^{28/} See In Re: Earth Satellite Communications, 95 F.C.C.2d 1223, ¶ 20 (1983) aff'd sub nom. New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984) ("ESCOM").

- b. Allow MDU access to be negotiated between MDU owners and MVPDs;
- c. Regulate MVPD contracts for MDU access in a non-discriminatory manner;^{29/} or
- d. Adopt building codes that require MDU owners to install conduits, wires and/or antenna sites to facilitate multiple MVPD access to residents.

Some state officials have expressed concern about authorizing MDU access for MVPDs which they do not control through a franchise. The states have the authority to regulate access to MDUs by all MVPDs regardless of whether the MVPD has a franchise. They need only exercise that authority in a non-discriminatory manner.^{30/}

^{29/} California has detailed consumer protection standards for all MVPDs, regardless of whether they have a franchise. Cal. Govt. Code § 53088.2 (West). Virginia prohibits landlords from accepting compensation from any MVPD, regardless of whether they have a franchise. Va. Code Ann. § 55-248.13:2 (Michie 1986).

^{30/} A common misconception of ESCOM is that the Commission banned any state or local regulation of MVPDs that do not occupy public streets. Actually, the Commission decision, affirmed by the D.C. Circuit, preempted only state or local regulation that has the purpose or effect of favoring market entry by franchised cable companies over MVPDs that do not use public property. Thus, the states can, consistent with ESCOM, regulate all MVPD access to MDUs provided that regulation is non-discriminatory and is not used as pretext to promote one competitor over another. The states could, consistent with ESCOM, require that any MVPD who seeks guaranteed access to an MDU must satisfy reasonable conditions to protect the appearance of the property, the safety and well being of the residents and pay just compensation to the owner. The state could also create a streamlined administrative procedure to effect MDU access. Amsat Cable v. Cablevision of Connecticut, supra note 16.